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3993 Howard Hughes Parkway, Suite 600
Las Vegas, NV 89169-5996
Facsimile (702) 949-8321
Telephone (702) 949-8320

Susan M. Freeman AZ State Bar No. 004199
Email: sfreeman@lrlaw.com
Rob Charles NV State Bar No. 006593
Email: rcharles@lrlaw.com

Attorneys for USACM Liquidating Trust

STUTMAN, TREISTER & GLATT, P.C.
FRANK A. MEROLA
(CA State Bar No. 136934)
EVE H. KARASIK
(CA State Bar No. 155356)
CHRISTINE M. PAJAK
(CA State Bar No. 217173), Members of
1901 Avenue of the Stars, 12th Floor
Los Angeles, California 90067
Telephone: (310) 228-5600
Facsimile: (310) 228-5788
Email: fmerola@stutman.com
ekarasik@stutman.com
cpajak@stutman.com

SHEA & CARLYON, LTD.
JAMES PATRICK SHEA
(Nevada State Bar No. 000405)
CANDACE C. CARLYON
(Nevada State Bar No. 002666)
SHLOMO S. SHERMAN
(Nevada State Bar No. 009688)
701 Bridger, Suite 850
Las Vegas, Nevada 89101
Telephone: (702) 471-7432
Facsimile: (702) 471-7435
Email: jshea@sheacarlyon.com
ccarlyon@sheacarlyon.com
ssherman@sheacarlyon.com

Counsel for the Official Committee Of
Equity Security Holders Of USA Capital First Trust Deed Fund, LLC

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEVADA

In re:

USA COMMERCIAL MORTGAGE COMPANY,
USA CAPITAL REALTY ADVISORS, LLC,
USA CAPITAL DIVERSIFIED TRUST DEED FUND,
LLC,
USA CAPITAL FIRST TRUST DEED FUND, LLC,
USA SECURITIES, LLC,

Debtors.

Affects:

- ☐ All Debtors
☒ USA Commercial Mortgage Company
☐ USA Capital Realty Advisors, LLC
☐ USA Capital Diversified Trust Deed Fund, LLC
☒ USA Capital First Trust Deed Fund, LLC
☐ USA Securities, LLC

Case No. BK-S-06-10725-LBR
Case No. BK-S-06-10726-LBR
Case No. BK-S-06-10727-LBR
Case No. BK-S-06-10728-LBR
Case No. BK-S-06-10729-LBR

CHAPTER 11

Jointly Administered Under Case No. BK-S-06-10725 LBR

**Objection of USACM Trust To Victor Maus
Claims Filed in Wrong Debtor's Case;
Objection of FTDF to Duplicative Claim and
Proposed Allowance of Claim**

Hearing Date: October 15, 2007

Hearing Time: 9:30 a.m.

Victor Maus filed Proof of Claim No. 10725-01384 against USA Commercial Mortgage Company ("USACM") showing claim amounts of both \$11,518.50 and \$11,997.31, with no attachment, and Claim No. 10725-01384 in the amount of \$11,518.50, with an attached statement showing an investment in USA Capital First Trust Deed Fund, LLC ("FTDF") with a "Old Statement Value" of \$11,518.50 and "Book Value" of \$11,979.31. The USACM Liquidating Trust (the "USACM Trust") hereby objects to Mr. Maus' claims. The basis for both claims is evidenced on their face as "share purchases" and in the attachment to Claim 10725-01384 as an investment in FTDF. In addition, Mr. Maus filed a proof of interest in the FTDF case in the amount of \$11,519.50 (the "Proof of Interest"). Accordingly, the claims were incorrectly filed in the USACM case.

The USACM Trust respectfully requests that these claims be disallowed as claims against USACM. Any claim held by Mr. Maus against USACM solely on account of his investment in FTDF is derivative of FTDF's claims against USACM. Under a settlement approved by the Court on June 12, 2007, all such FTDF claims were settled, with FTDF holding a \$7.0 million allowed general unsecured claim and beneficial interest in the USACM Liquidating Trust. The equity interest holders in FTDF will share in any recovery on account of that claim.

The Official Committee of Equity Security Holders of FTDF ("FTDF Committee") further object to any proposed allowance of Mr. Maus' claims in the FTDF estate for two reasons: (1) the claims are duplicative; and (2) they are equity interests that have been improperly characterized as claims..

Bankruptcy Code section 502 authorizes a party in interest to object to claims. See 11 U.S.C. § 502(a). Upon such objection, this Court, "after notice and a hearing, shall determine the amount of such claim in lawful currency of the United States as of the date of the filing of the petition" 11 U.S.C. § 502(b). Although a proper proof of claim is presumed valid under Bankruptcy Rule 3001(f), once an objection controverts the

1 presumption, the creditor has the ultimate burden of persuasion as to the validity and
2 amount of the claim. Ashford v. Consolidated Pioneer Mortg. (In re Consolidated Pioneer
3 Mortg.), 178 B.R. 222, 226 (9th Cir. B.A.P. 1995), aff'd, 91 F.3d 151 (9th Cir. 1996)
4 (quoting In re Allegheny International, Inc., 954 F.2d 167, 173-74 (3d Cir. 1992)).

5 The FTDF Committee has analyzed the Maus claims and has determined that they
6 have been incorrectly designated as "proofs of claim." Indeed, Mr. Maus appropriately
7 filed the Proof of Interest in the FTDF case. Pursuant to Bankruptcy Code section 502, a
8 "creditor . . . may file a proof of claim." An equity security interest holder, however, must
9 file a proof of interest. See 11 U.S.C. § 501(a). Bankruptcy Code section 101(16) defines
10 "equity security" to include a "share in a corporation, whether or not transferable or
11 denominated 'stock', or *similar security*" or a "warrant or right . . . to purchase, sell, or
12 subscribe to a share, security, or interest" of a share in a corporation. 11 U.S.C. § 101(16)
13 (emphasis added). See also Nev. Rev. Stat. §86.521 (upon dissolution of a limited liability
14 company, a limited liability company must pay liabilities to creditors before paying
15 liabilities in respect of profits and/or capital to members of the limited liability company).

16 The Maus claims clearly reflect that they are based on Mr. Maus' membership in
17 the FTDF and not based on any debt he holds against the FTDF. For example, annexed to
18 one of the Maus claims are account statements that list the number of shares Mr. Maus
19 holds in the FTDF, the price of such shares, and the FTDF member's account identification
20 number. Membership interests and/or shares in the FTDF clearly fall within the definition
21 of "equity security" under Bankruptcy Code section 101(16). Thus, the holders of the
22 equity interests are equity security interest holders of the FTDF and do not hold unsecured
23 claims against the FTDF estate. Indeed, Mr. Maus appropriately filed the Proof of Interest
24 in the FTDF case.

25 In addition, Mr. Maus filed one of his claims using the amount described as "book
26 value" on investor statements provided to FTDF members by the FTDF. "Book value" as

1 listed on investor statements is not the proper measure of an FTDF member's equity
2 interest in the FTDF. An FTDF member's equity interest is the amount that the FTDF
3 member has invested in the FTDF, either through the purchase of shares or the
4 reinvestment of dividends. The "book value" listed on an FTDF member's investor
5 statement simply represents an estimate of the FTDF's net assets on a given day divided by
6 the number of shares outstanding. Because it is an estimate that constantly changes, "book
7 value" should not be the benchmark used to determine each FTDF member's interest in the
8 FTDF. In contrast, the amount of each FTDF Member's equity interest in the FTDF as of
9 the Petition Date is a value that is a fixed amount that is readily ascertainable from the
10 Debtors' books and records. Therefore, since Mr. Maus asserts an amount in excess of Mr.
11 Maus' equity interest in the FTDF as of the Petition Date, on account of the "book value"
12 listed on an investor statement, i.e., \$11,979.31,¹ Mr. Maus should retain his equity
13 interest in the FTDF, but only in the amount as of the Petition Date, which is \$11,518.50.

14 This objection does not seek to prejudice the rights of Mr. Maus as an FTDF
15 member to recover from the FTDF estate on account of his membership interest of
16 \$11,518.50, which is the amount asserted both in one of his claims, in the Proof of Interest
17 and in the Debtor's books and records. Mr. Maus shall retain his interest in FTDF in the
18 amount of \$11,518.50 as reflected both in the Proof of Interest and the books and records
19 of FTDF. Indeed, Mr. Maus has received distributions based on this FTDF membership
20 interest to date, with no objection.

21 Accordingly, the USACM Trust and the FTDF Committee seek entry of an order
22 that will disallow the Maus claims against USACM, disallow any proposed allowance of
23 the Maus claims in the FTDF case, and appropriately allow Mr. Maus to retain his equity
24

25 ¹ The Maus claim that seeks the Book Value amount is actually in the amount of
26 \$11,997.31 which appears to be an inadvertent transposition of numbers since the Book
value on the attached statements is listed as \$11,979.31.

1 interest in the FTDF in the amount of \$11,518.50 as reflected both in the Proof of Interest
2 and the books and records of FTDF as of the bankruptcy petition filing date.

3 This objection is made pursuant to Bankruptcy Code section 502, Federal Rule of
4 Bankruptcy Procedure 3007, and Local Rule of Bankruptcy Practice 3007.

5 Dated: August 8, 2007

6
7 By: /s/ Eve H. Karasik
8 FRANK A. MEROLA (CA State Bar
9 No. 136934),
10 EVE H. KARASIK (CA State Bar
11 No. 155356), and
12 ANDREW M. PARLEN (CA State Bar No.
13 230429), Members of
14 STUTMAN, TREISTER & GLATT, P.C.
15 1901 Avenue of the Stars, 12th Floor
16 Los Angeles, CA 90067
17 Telephone: (310) 228-5600

By: /s/ Rob Charles (#006593)
SUSAN M. FREEMAN
ROB CHARLES
LEWIS AND ROCA LLP
3993 Howard Hughes Parkway, Suite 600
Las Vegas, NV 89169-0961
Facsimile (702) 949-8321
Telephone (702) 949-8320
COUNSEL FOR USACM Liquidating
Trust

14 and

15 CANDACE C. CARLYON
16 Shea & Carlyon, Ltd.
17 233 S. Fourth Street, Suite 200
18 Las Vegas, NV 89101
19 Telephone: (702) 471-7432
20 COUNSEL FOR THE
21 OFFICIAL COMMITTEE OF EQUITY
22 SECURITY HOLDERS
23 OF USA CAPITAL FIRST TRUST DEED
24 FUND, LLC
25
26

LEWIS
AND
ROCA
LLP
LAWYERS

Copy of the foregoing
Mailed this 8th day of
August, 2007 to:

Victor Maus
2999 Douglas Blvd. #155
Roselle, CA 95661

By /s/ Renee L. Creswell